No. 95-23 (2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

WILLIAM RODEN, as Trustee of Ernest M. Still Trust; RODEN FARMS, a General Partnership; CAL FARM INVEST, INC., a California corporation; GARY HAMILTON, an individual; SUSAN HAMILTON, an individual,

Petitioners,

vs.

BLACKWELL LAND COMPANY, INC., a Delaware corporation; PARAMOUNT FARMING CO. L.P., a California Limited Partnership; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware corporation; BERRENDA MESA WATER DISTRICT, a California State Water District,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT BERRENDA MESA WATER DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER (1) STATE ACTION IMMUNITY PROTECTS A CALIFORNIA WATER DISTRICT FROM FEDERAL ANTITRUST LIABILITY WHEN IT PERFORMS ACTS WHICH IT IS AUTHORIZED TO PERFORM PURSUANT TO PROVISIONS OF THE CALIFORNIA WATER CODE, AND WHETHER (2) STATE ACTION IMMUNITY AND THE *NOERR PENNINGTON* DOCTRINE PROTECT THE LANDOWNERS WHOSE REPRESENTATIVES SERVE ON THE WATER DISTRICT'S BOARD PURSUANT TO PROVISIONS OF THE CALIFORNIA WATER CODE FROM FEDERAL ANTITRUST LIABILITY WHEN THEY SEEK OFFICIAL ACTION FROM THE WATER DISTRICT.

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STATEMENT OF THE CASE

Respondent Berrenda Mesa Water District ("BMWD") respectfully requests that this Court deny the petition of William Roden, Roden Farms, Cal Farm Invest, Inc., Gary Hamilton and Susan Hamilton (hereinafter "petitioners") for writ of certiorari.

Petitioners in this federal antitrust action[1] are unhappy with decisions by the BMWD to impose standby charges and ad valorem taxes, foreclose or threaten to foreclose on lands where assessments are delinquent, and to cancel approval for proposed sales of portions of the water district's permanent water entitlement. Petitioners concede that all of the conduct at issue was authorized by and complied with the provisions of the California Water Code.

The relevant facts have been set forth in the opinion of the district court. Petition, Appendix A at pp. 2-9. As stated therein, the BMWD is an entity duly organized under the California Water Code.[2] Petition, Appendix A

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[1] Petitioners' complaint also raised pendent state law claims of intentional and negligent interference with prospective economic advantage, violation of the California Cartwright Act and unfair competition laws, and declaratory relief against the BMWD for breach of fiduciary duty. The district court declined to exercise supplemental jurisdiction over these remaining claims and dismissed them without prejudice.

[2] The California Water Code devotes hundreds of pages of provisions to the formation of water districts and to their internal organization, elections, powers and purposes, finances, assessments, and the levy, collection and enforcement of district assessments. Cal. Water Code §§ 34000-38999. Pursuant to the provisions of the Code, the BMWD has been given power to perform all acts necessary or proper "to plan, construct,

at pp. 2-3. Under the Code the BMWD is explicitly authorized to impose standby charges,[3] ad valorem taxes, and water tolls on landowners in the district. Cal. Water Code §§ 31031, 31032.1, 35470 and 37200 *et seq.* The BMWD is also expressly authorized to impose liens upon property for which standby charges and ad valorem taxes are delinquent and to cause foreclosure sales in order to satisfy such liens. Cal. Water Code § 36825, §§ 36950 *et seq.*, §§ 37050 *et seq.*, §§ 37150 *et seq.*, § 35479, and §§ 37200 *et seq.* The BMWD is vested with power to sell portions of its maximum annual entitlement where it has made a determination that it is in the best interests of the district to do so. Cal. Water Code §§ 35425, 35604.

Under the Code, the Board of the BMWD is comprised of five members elected by landowners in the district. Each member of the Board must be a holder of title to land in the district, or the representative of a corporation holding land in the BMWD. Cal. Water Code § 34700. The Board is elected by landowners who vote according to the assessed value of the land they own in the district. Cal. Water Code § 35003.

For purposes of the motions to dismiss brought by respondent BMWD and by the landowner respondents,

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maintain, improve, operate, and keep in repair the necessary works for production, storage transmission, and distribution of water for irrigation, domestic, industrial, and municipal purposes." Cal. Water Code §§ 35400-35401.

[3] The standby charges of which petitioners vigorously complain (Petition at pp. 8-9) were instituted in 1985. Appendix A attached hereto, ¶22. Standby charges are "to pay the debt service, administration costs, and fixed costs of the [State Water Project]." *Id.*, ¶21.

the facts alleged in petitioners' complaint were accepted as true, including unsubstantiated allegations concerning "secret agreements," "closed meetings," "threatened litigation" and an alleged "conspiracy" pursuant to which the BMWD Board voted to cancel approval of proposed sales of portions of the BMWD's permanent water entitlement to the Moulton Niguel and Summit Valley Water Districts. A copy of petitioners' complaint is appended hereto as Appendix A.

The district court below found that respondent BMWD was immune under state action immunity, and that the landowner respondents were immune under the *Noerr Pennington* doctrine. Petition, Appendix A. The Ninth Circuit unanimously affirmed that decision, holding that the BMWD was immune from petitioners' federal antitrust claims under the state action immunity doctrine, and that the landowner respondents Blackwell Land Company, Paramount Company L.P. and its affiliated companies (hereinafter collectively the "landowner respondents") were immune from petitioners' federal antitrust claims under the *Noerr Pennington* doctrine. Petition, Appendix B.

Petitioners now argue with respect to the landowner respondents that the "sham exception" to the *Noerr Pennington* doctrine prevents finding the landowners immune under that doctrine, and that the "active supervision" requirement for private actors seeking to establish state action immunity prevents finding the landowners immune under state action immunity. Petition at pp. 11-16. With respect to respondent BMWD, petitioners now contend that the district was required to

show a "not unreasonable exercise of authority" to establish state action immunity. Petition at pp. 16-20.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Petitioners have not presented any issues warranting review by this Court. Nor have petitioners cited any cases evidencing that the opinion of the district court and the unanimous opinion of the Ninth Circuit affirming that decision conflict in any way with the decisions of this Court or any appellate court. Nor have petitioners demonstrated that the decisions below are erroneous. To the contrary, the courts below engaged in a lengthy review of California water law and fundamental principles of federal antitrust law, and faithfully and correctly adhered to this Court's settled precedents governing state action immunity and the *Noerr Pennington* doctrine. For these reasons, the writ petition should be denied.

ARGUMENT

I. PETITIONERS FAIL TO RAISE ANY ISSUES WARRANTING REVIEW.

A. The "Active Supervision" Requirement For Establishing State Action Immunity For Private Actors Does Not Raise An Issue Warranting Review.

Petitioners' argument that the Ninth Circuit erred in not addressing the "active supervision" requirement for

finding state action immunity as to the landowner respondents does not raise an issue warranting review. To the extent that the landowner respondents are immune under the *Noerr Pennington* doctrine, as the Ninth Circuit held below, "active supervision" is not required to establish immunity under that doctrine. Since, moreover, the conduct complained of, *i.e.*, the imposition of standby charges and ad valorem taxes, the institution of foreclosure proceedings, and decisions concerning sales of surplus water, are official actions carried out by the BMWD, "active supervision" is, as petitioners concede, not required. Petition at p. 19; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) (active supervision need not be shown by municipalities performing governmental functions). For these reasons, petitioners' contention that the Ninth Circuit erred by failing to address whether there was "active supervision" with respect to surplus water sales is unavailing.

Contrary to petitioners' assertions, furthermore, even if a showing of "active supervision" had been required, there was sufficient evidence of such supervision. The "active supervision" prong of *Midcal* permits private parties to claim state action immunity when the challenged conduct is "actively supervised by the State itself." *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1985). This is satisfied if " 'state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.' " *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (decisions by a private utility held to be "actively supervised" where the decisions were reviewed by state officials).

Here, the sale of the scarce commodity of water is a public matter scrutinized and heavily regulated by state authorities. As petitioners' complaint alleges, in connection with a proposed water transfer the BMWD must hold hearings and submit a filing to the state of California, and must circulate an "Initial Study and Proposed Negative Declaration." Appendix A attached hereto, ¶31. Under the regulatory scheme, the Kern County Water Agency ("KCWA"), a subdivision of the state of California, holds hearings on proposed transfers of State Water Project entitlement. Petition, Appendix A at pp. 5, 7. County and state approval is required for contracts entered into by the BMWD for water transfers. Appendix A attached hereto, ¶¶27-28, 42. Accordingly, even assuming "active supervision" applied to the landowner respondents, which it does not, petitioners' statement that "there is not even the potential for state supervision" over surplus water sales (Petition at p. 15) is wholly inaccurate and this issue does not warrant review.[4]

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[4] Although decisions *not* to transfer a portion of the district's water entitlement are not reviewed, this does not equate to the absence of "active supervision" over the water district since it would be both impractical and unreasonable for the state to delegate powers and authority to local governmental entities, and to at the same time actively supervise every decision by local governmental entities not to exercise those powers. There are an infinite number of such negative "decisions."

B. Petitioners' Argument That the BMWD's Conduct Constituted an "Unreasonable Exercise of Authority" Does Not Raise An Issue Warranting Review.

Petitioners' argument, based on language found in a Texas district court case called *Santos v. City of Houston, Texas*, 852 F. Supp. 601, 605-607 (S.D. Tex. 1994), that the Ninth Circuit erred in failing to consider the reasonableness of the BMWD's conduct in not selling surplus water, also lacks merit. Petitioners misstate the law with respect to establishing state action immunity for a municipality when they assert:

> A "state action exemption," as pronounced in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct 307 (1943), may apply to a municipality when: (1) the state legislature has "clearly articulated and affirmatively expressed" a state policy granting the municipality the power to legislatively displace competition within a particular regulated area; *and* (2) *the municipality has not unreasonably exercised such authority.*

Petition at pp. 17-18 (emphasis added).

Petitioners here incorrectly seek to require a municipal entity seeking state action immunity to show that the challenged conduct constitutes a "not unreasonable exercise of authority." This proposed additional requirement for state action immunity has never been set forth in the decisions of this Court.[5] To the contrary, the well established requirement for a municipality seeking state action

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[5] The cases cited by petitioners (*Community Communication Co. v. City of Boulder*, 455 U.S. 40, 51 (1982) and *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 409 (1977)) do not set forth

immunity, which was applied by the Ninth Circuit in the case at bar, is that a municipal entity show that the allegedly anticompetitive conduct is a "foreseeable result" of the state's regulations. *Town of Hallie*, 471 U.S. at 38-39, 42, 47; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991). Petitioners' proposed requirement, *i.e.*, that a municipality show a "not unreasonable exercise of authority," would seriously undermine state action immunity; as this Court stated in *Town of Hallie*, federal courts should not become "embroil[ed] . . . in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny." 471 U.S. 34 at n.7.

Nor has petitioners' proposed requirement been addressed by this Court. Petitioners incorrectly state that "[t]his Court, in *Indep. Taxi v. Greater Houston*, 474 U.S. 903, 106 S. Ct. 231 (1985), addressed the issue of reasonableness in exercise of authority" (Petition at p. 19). Far from addressing that issue, this Court in *Arrow Northwest, Inc., et al. v. Greater Houston Transportation Company*, 474 U.S. 903 (1985), denied a petition for certiorari to review a Fifth Circuit decision of *Independent Taxicab Drivers Employees, et al. v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1985), *cert. denied*, 474 U.S. 903 (1985). Furthermore, while the Fifth Circuit observed in that case that the conduct at issue was not an unreasonable exercise of authority, the Fifth Circuit there reiterated this Court's rule that the conduct at issue need only

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any additional requirement that a municipality show that it "has not unreasonably exercised its authority."

be a foreseeable result of the state's regulations. *Id.* at 610 citing *Town of Hallie,* 105 S. Ct. at 1719. The Fifth Circuit also, analogous to the case at bar, found that Texas had delegated the management of both private carriers and airports to the state's municipalities through statues directed towards these ends, and that the City of Houston was immune with respect to its decision to confer the privilege of airport taxicab operation on a single company. *Id.* at 611.

Even if it were necessary for a municipal entity seeking state action immunity to demonstrate that its conduct constitutes a "not unreasonable exercise of authority," the facts recited by petitioners themselves evidence that the BMWD acted in a reasonable manner with respect to cancelling the proposed sales of portions of the water district's permanent water entitlement. Petitioners ignore the facts alleged in their own complaint when they contend in their brief that:

> . . . [t]he BMWD action in arbitrarily not selling surplus water is not achieving the current objective which is to act in the best interest of the district and its members.
>
> . . .
>
> . . . there is no evidence that there was a need to retain such surplus' [sic] of water and there is no evidence that the sale of this water would have posed a threat to the supply of water needed for future use. Quite the contrary, the surplus far exceeded the amount necessary to sustain the District's future needs.

Petition at pp. 19-20.

The BMWD acted reasonably because, as petitioners state in their brief, there are no other viable sources of water for farming within the BMWD. Petition at p. 4. The proposed sales at issue were of significant portions of the water district's permanent water entitlement (*i.e.*, as much as one-third of the district's future water supply). Petition, Appendix A, pp. 5, 7. As petitioners state in their complaint, the cancellation of approval of the proposed sales of portions of the water district's permanent water entitlement was done with the "intent of insuring the maximum water entitlement to BMWD so that even in drought years the defendants would have adequate water supplies." Appendix A attached hereto, ¶58c. Although the proposed sales of portions of the water district's permanent water entitlement would have been a windfall and benefit for the individual petitioners themselves who want to abandon farming,[6] it is certainly reasonable for the district to consider and act to insure that landowners within the district will have adequate water supplies for drought years. The water district's exercise of its discretion under the statute, particularly in view of the severe drought conditions in California during the years when the decisions were made, to cancel approval for the proposed water sales cannot be said to be an "unreasonable exercise of authority."

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[6] It is by no means certain that all other necessary approvals would have been obtained and all regulatory requirements would have been met with respect to the proposed sales of substantial portions of the BMWD's permanent water entitlement, or that the proposed transactions would ultimately have gone forward.

Petitioners' reliance on *Santos v. City of Houston, Texas*, 852 F. Supp. 601 (S.D. Tex. 1994), which bears no similarity to the case at bar, to argue that the BMWD's conduct was not exercised in a reasonable manner is also misplaced. That case involved a 1924 ordinance expressly prohibiting certain specific types of jitney service in the City of Houston.[7] The district court found that the specific prohibitions of the ordinance no longer served their original purpose of protecting streetcars from competition, had randomly and arbitrarily been enforced by the city, and violated substantive due process and equal protection rights under the federal constitution. *Id.* at 606-609. The City of Houston's random enforcement of a specific prohibition in an unconstitutional ordinance (nearly seventy years after its enactment) is not analogous to the water district's exercise of its discretion pursuant to a California Water Code provision, the constitutionality of which is not at issue, not to approve proposed sales of significant portions of the water district's permanent water entitlement.

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[7] The ordinance at issue was a 1924 antijitney ordinance which (1) prohibited jitney service on streets with streetcar tracks and (2) banned jitneys with seating capacity of less than 15 passengers. *Id.* at 603. The first clause of the ordinance was obsolete because there were no remaining streetcar tracks in the City of Houston. The second clause of the ordinance effectively banning all jitney operations in the city had been enforced only randomly. *Id.* The ordinance was challenged on federal constitutional and antitrust grounds by a taxicab driver who had allegedly been threatened by city officials under the ordinance with loss of his license.

II. THE NINTH CIRCUIT CORRECTLY FOUND THAT STATE ACTION IMMUNITY PROTECTED RESPONDENT BMWD FROM ANTITRUST LIABILITY.

As set forth in the Ninth Circuit's decision, state action immunity was first announced in *Parker v. Brown*, 317 U.S. 341, 352 (1943). State action immunity applies to anticompetitive restraints imposed by states "as an act of government." *City of Columbia*, 499 U.S. 365, 111 S. Ct. 1344, 1348-1349 (1991) (quoting *Parker*, 317 U.S. at 352). The doctrine is based on principles of federalism and state sovereignty. *Id.*

State action immunity also applies to actions of political subdivisions of a state where those actions are an authorized implementation of state policy. *Id.*; *see also, e.g., Town of Hallie*, 471 U.S. 34 (municipality immune); *Grason Electric Co., et al. v. Sacramento Municipal Utility District*, 770 F.2d 833 (9th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986) (municipal utility district immune). To qualify for state action immunity, a municipal entity performing a governmental function need only show that it is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation. *See, e.g., Town of Hallie*, 471 U.S. at 47.

Here, the Ninth Circuit straightforwardly applied this standard to the BMWD's conduct and correctly held, as other courts have before, that the California Water Code has a clearly articulated and affirmatively expressed state policy to displace competition with regulation and that decisions relating to surplus water sales are immune under state action immunity. *See, e.g., Kern-*

Tulare Water District v. City of Bakersfield, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988) (city immune from antitrust liability for decision not to sell surplus water). The State of California's constitution provides that the use of water is subject to the regulation of and control of the state, *see* Cal. Const. Art. 10, § 5, and all of the conduct of the BMWD which is challenged by petitioners is either explicitly authorized or a foreseeable result of the California Water Code's express provisions. *See* Cal. Water Code §§ 34700, 35003 (landowner representation); Cal. Water Code §§ 31031, 31032.1, 35470 and § 37200 *et seq.* (standby charges and ad valorem taxes); Cal. Water Code § 36950 *et seq.* (liens and foreclosure proceedings); Cal. Water Code §§ 35425, 35604 (discretion to approve surplus water sales when in the "best interests" of the district).[8]

Even assuming petitioners' unsubstantiated allegations of conspiracy, there is no exception to state action immunity for allegedly "conspiratorial" conduct. In *City of Columbia*, this Court explicitly considered and rejected

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[8] The actual imposition of standby charges and ad valorem taxes, and of liens and foreclosure proceedings for delinquent assessments, is a foreseeable result of state policy; the state necessarily anticipated the water district would impose standby charges and ad valorem taxes, and liens where assessments were delinquent, when it explicitly so provided in the California Water Code. Similarly, the state of California necessarily foresaw that the water district would refuse to approve proposed water sales to preserve the district's future water supply when the state enacted California Water Code § 35425 authorizing such sales only when the water was deemed to be "surplus" and the proposed transfer was in the "best interests of the district."

the argument that there should be a "conspiracy" exception to either state action immunity or the *Noerr Pennington* doctrine based on corruption, bad faith, or abandonment of public responsibility to private interests. 111 S. Ct. at 1352, 1355. There, this Court unequivocally held that there could be no exception to state action immunity based on alleged "secret anticompetitive agreements" between private citizens and government officials. *Id.* at 1352.

Nor is there a "financial interest" exception to state action immunity. Such an exception would be contrary to the case which is the cornerstone of the state action immunity doctrine, *i.e.*, the *Parker* Court itself held that a state's requirement that a raisin marketing program be approved by referendum of financially interested raisin producers did not destroy antitrust immunity. There, plaintiff raisin producer challenged a marketing program approved by raisin producers owning 51% of the acreage devoted to production of the raisins in the statutory proration zone. 317 U.S. at 347. The *Parker* Court held that antitrust immunity applied to the statewide raisin marketing program because the state had authorized the establishment, through the action of state officials, of such programs for the marketing of agricultural commodities. The Court stated that "[t]he prerequisite approval of the program upon referendum . . . is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits." *Id.* at 352.

Nor are there any cases in the area of water regulation from this Court or any appellate court which petitioners have cited which are inconsistent with the case at

bar. To the contrary, finding the BMWD immune from antitrust liability is entirely consistent with the holdings of the Ninth Circuit and other circuits addressing antitrust immunity in the area of water regulation.[9]

III. THE NINTH CIRCUIT CORRECTLY FOUND THAT THE *NOERR PENNINGTON* DOCTRINE PROTECTED THE LANDOWNER RESPONDENTS FROM ANTITRUST LIABILITY.

As set forth in the opinions of the Ninth Circuit and the district court below, the *Noerr Pennington* doctrine renders the federal antitrust laws inapplicable to the conduct of private individuals seeking anticompetitive action from the government. *See, e.g., City of Columbia*, 111 S. Ct. at 1354. The doctrine was set forth in *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657

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[9] *See, e.g., Kern-Tulare Water District v. City of Bakersfield*, 828 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988) (city immune from antitrust liability for decision not to sell surplus water); *McCallum v. City of Athens, Georgia*, 976 F.2d 649, 651 (11th Cir. 1992) (the city of Athens' operation of a waterworks was immune from antitrust liability for alleged Sherman Act violations based on increased rates charged to nonresidents of the city of Athens, and on alleged agreements with the neighboring public utility authority to divide markets); *Falls Chase Special Taxing District v. City of Tallahassee*, 788 F.2d 711 (11th Cir. 1986) (city's allegedly anticompetitive legal challenge to the issuance of a construction permit exempt from federal antitrust laws); *Auton v. Dade City, Florida*, 783 F.2d 1009 (11th Cir. 1986) (city immune from antitrust prosecution by plaintiff water well contractors who contended that the city's ordinance prohibiting drilling of private water wells within the city limits violated the antitrust laws).

(1965). This Court expressly held in *Noerr* that the Sherman Act should not be construed to "disqualify people from taking a public position on matters in which they are financially interested . . . " 365 U.S. at 139. Similarly, this Court expressly held in *Pennington* that the fact that a party's private political motives are selfish is irrelevant since "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Pennington*, 381 U.S. at 670 (1965).

The fact that the landowner respondents have representatives who serve on the BMWD board is a direct result of explicit provisions of the California Water Code, which has been found constitutional in this respect in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973) (approving on constitutional grounds the election of the board of California water districts based upon "one acre one vote"). To the extent that landowner respondents or other landowners within the district have sought to influence the water district's decisions with respect to imposing assessments, foreclosure proceedings, and the sale of the water district's permanent entitlement, those activities are legitimate political activities under the *Noerr Pennington* doctrine. *See, e.g., Federal Prescription Serv., Inc. v. American Pharmaceutical Assn.*, 663 F.2d 253, 264 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982) (lobbying of state pharmacy boards composed of pharmacists held to be immune from federal antitrust liability despite allegations that boards acted in their commercial self-interest, because their function and composition is determined by state law). To hold otherwise would be to ignore the fact that the Sherman Act

was not meant to regulate political activity. *Id.* citing *Parker*, 317 U.S. 341; *Noerr*, 365 U.S. 127.

Petitioners' argument for the first time in their petition before this Court that the "sham exception" applies and prevents finding the landowner respondents immune does not raise an issue warranting review. As set forth in the decision of the district court below (Appendix A at pp. 30-32), and in Paramount's Brief In Opposition To Petition For Certiorari filed concurrently with this opposition, the "sham exception" does not apply to genuine efforts to secure government action. Since petitioners alleged in their complaint that the landowner respondents successfully secured government action from the BMWD, the newly raised "sham exception" is not applicable. For these reasons, and for the reasons set forth more fully in the Brief of Respondent Paramount in Opposition to Petition For Writ of Certiorari filed concurrently with this opposition, the Ninth Circuit correctly found that the *Noerr Pennington* doctrine protects the landowner respondents.

IV. THE NINTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' COMPLAINT.

Petitioners miscast as antitrust violations actions taken by the BMWD which are authorized by and in full compliance with the California Water Code, and which are part of the state's comprehensive regulatory scheme for the allocation of water. The nature of the allegedly anticompetitive conduct and the extensive regulatory

scheme authorizing that conduct renders antitrust immunity appropriate and any amendment of petitioners' complaint would be futile. For these reasons, the Ninth Circuit's affirmance of the district court's 12(b)(6) dismissal was proper.

CONCLUSION

For all the reasons set forth above, petitioners have presented no persuasive reason for this Court to review the decision of the Ninth Circuit unanimously affirming the decision of the district court and the petition for certiorari should be denied.

Respectfully submitted,

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August 2, 1995

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APPENDIX A

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAVID G. HEDGECOCK, RILDA R. HEDGECOCK, WILLIAM RODEN, as Trustee of the Ernest M. Still Trust, RODEN FARMS, a General Partnership, CAL FARM INVEST, INC., a California Corporation, CHANDLER'S PALOS VERDES SAND AND GRAVEL, a Corporation, SANTA FE ENERGY RESOURCES, INC., a Corporation, GARY HAMILTON, and SUSAN HAMILTON Plaintiffs	CASE NO. CV-F 92-5886-OWW **COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF** FEDERAL ANTITRUST: 1. Unfair Business Conduct 2. Attempt to Monopolize 3. Monopolization

vs.

BLACKWELL LAND COMPANY, INC., a Delaware Corporation; PARAMOUNT FARMING COMPANY, L.P., a California limited partnership; PARAMOUNT FARMING ENTERPRISES, INC., a Delaware Corporation; PARAMOUNT ORCHARDS HOLDINGS, INC., a Delaware Corporation; PARAMOUNT FARMS, INC., a Delaware Corporation; BERRENDA MESA WATER DISTRICT, a California State Water District

Defendants.

PENDENT STATE CLAIMS:

4. Tortious Interference
5. Negligent Interference
6. Cartwright Act
7. Declaratory Relief

DEMAND FOR JURY TRIAL

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Plaintiffs allege:

I

INTRODUCTION

This case involves one of the most important issues in California today – water. The defendants are certain entities who conspired under the color of official titles as members of the Board of Directors of a Water District to commit unfair business practices against less powerful and often, small farmers to deny them the rights under the law. They did this by secret agreements to control votes and to thus capture water and land for themselves. All of these agreements were in violation of Federal and State laws. Further, the statutes under which these defendants operate violate the Constitutional rights of the plaintiff.

II

JURISDICTION AND VENUE

1. This Court has jurisdiction under the Sherman Act, 15 U.S.C. §7, and the Clayton Act, 15 U.S.C. §§15 and 26, to enjoin the activities of defendants hereinafter recited, and to recover damages, costs, and attorney's fees, sustained by plaintiffs by reason of defendants' violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2. The Court also has jurisdiction under the principles of pendent jurisdiction.

2. Venue is proper in this District Court, pursuant to 28 U.S.C. §1391(b) and 15 U.S.C. §22 in that the plaintiffs and all of the defendants are doing business in and own property in this district, and the activities of the defendants which gave rise to the claim for relief and the damages occurred in this district.

III

PLAINTIFFS

3. Plaintiffs DAVID G. HEDGECOCK and RILDA R. HEDGECOCK are, and at all times herein mentioned were, individuals who owned land in the BERRENDA MESA WATER DISTRICT ("BMWD") for the business purpose of farming. Plaintiffs own 20.0 acres in the non-service area of BMWD and consents to detach their land from BMWD and sell their water allotment of 2.82 acre feet per acre.

4. Plaintiff WILLIAM RODEN, as Trustee of the Ernest M. Still trust owns, and at all times herein mentioned owned land in the BMWD for the business purpose of farming. Plaintiff owns approximately 935 acres on which it defaulted on BMWD stand-by charges and has been threatened with loss of its land through foreclosure sale. In 1990, plaintiff consented to detach its land from BMWD and sell its water allotment of 2.82 acre feet per acre.

5. Plaintiff RODEN FARMS is, and at all times mentioned was, a general partnership duly organized and existing under the laws of the State of California, and leases 1,364 acres from the Earnest M. Still Trust for the business purpose of farming. RODEN FARMS is responsible for the payment of stand-by charges under the terms of its lease and has paid in excess of $400,000 in stand-by charges for which it did not order or receive any water.

6. Plaintiff CAL FARM INVEST, INC. is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California, which owns land in the BMWD for the business purpose of farming. Plaintiff owns approximately 1,700 acres, on which it defaulted on BMWD stand-by charges and has been threatened with loss of its land through foreclosure sale. Prior to defaulting on stand-by charges, plaintiff paid in excess of $900,000 in stand-by charges for which it did not order or receive any water. In 1990, plaintiff consented to detach 2,170 acres of its land from BMWD and sell its water allotment of 2.82 acre feet per acre.

7. Plaintiff CHANDLER'S PALOS VERDES SAND AND GRAVEL is, and at all times herein mentioned was a California corporation which owned land in the BMWD for the business purpose of farming. Plaintiff owns 80 acres and in 1990, consented to detach its land from BMWD and sell its water allotment of 2.82 acre feet per acre.

8. Plaintiff SANTA FE ENERGY RESOURCES, INC. is, and at all times herein mentioned was, a corporation which owns land in the BMWD. Plaintiff has paid in excess of $300,000 in stand-by charges for which it did not order or receive any water. Plaintiff owns approximately 400 acres in the BMWD and consents to detach its land from BMWD and sell its water allotment of 2.82 acre feet per acre.

9. Plaintiffs GARY HAMILTON and SUSAN HAMILTON are individuals who own land in the BMWD for the business purpose of farming. Plaintiffs own approximately 40 acres in the BMWD and consents to detach their land from BMWD and sell their water allotment of 2.82 acre fee per acre.

IV
DEFENDANTS

10. Defendant BLACKWELL LAND COMPANY, INC. ("BLACKWELL") is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of Delaware, and is authorized to transact, and is transacting business in California, with its principal place of business in this state; and

at all times herein mentioned owned land in Kern County, California.

11. Defendant PARAMOUNT FARMING COMPANY, L.P., ("PARAMOUNT") is, and at all times herein mentioned was, a California Limited Partnership, certified with the Secretary of State, with is principal place of business located in this state; and at all times herein mentioned owned land in Kern County, California.

12. Defendants PARAMOUNT FARMING ENTERPRISES, INC. ("PFE") and PARAMOUNT ORCHARDS HOLDINGS, INC. ("POH") are, and at all times herein mentioned were, general partners in the partnership known as PARAMOUNT, and are sued herein both individually and as partners in said partnership. PFE and POH are, and at all times herein mentioned were, corporations duly organized and existing under the laws of the State of Delaware, and are authorized to transact, and are transacting business in California, each with its principal place of business in this state; and at all times herein mentioned owned land in Kern County, California.

13. Defendant, PARAMOUNT FARMS, INC. ("PFI") is, and at all times herein mentioned was, a corporation duly organized and existing under the State of Delaware, and is authorized to transact, and is transacting business in California, with its principal place of business in this state; and at all times herein mentioned owned land in Kern County California.

14. Defendant, BERRENDA MESA WATER DISTRICT ("BMWD") is, and at all times herein mentioned was, a California State Water District duly organized and existing under the California Water District Law. It is

named here solely as a defendant in connection with the request for injunctive relief and declaratory relief and no damages are sought from this defendant. Accordingly, no statutory claim has been filed against them for any type of monetary damages.

V

UNNAMED CO-CONSPIRATORS

15. There are numerous unnamed co-conspirators, aiders and abettors and others who participated directly or indirectly in the activities alleged in this complaint. Three of those entities are BERRENDA MESA FARMING ("BMF"), WEST HILLS COOPERATIVE, INC. ("WHC"), and A & P RANCH, a California Limited Partnership ("A & P"). Other co-conspirators include certain employers or agents of named defendants as well as certain partners in named partnerships. Bach contributed directly or indirectly to the losses caused to the plaintiffs.

VI

OVERVIEW OF TRADE AND COMMERCE

A. BASIC STRUCTURE OF WATER SUPPLY AND GENERAL MARKET PLACE

16. In 1960 the California Water Resources Development Bond Act, California Water Code §12930 *et seq.*, provided for the California State Water Project ("SWP"). The object of this act was the construction of a State Water Resources Development System, including an aqueduct system to distribute water to various parts of the state. Pursuant to the California Water Resources

Development Bond Act, the SWP is administered by the California Department of Water Resources ("DWR").

17. The KERN COUNTY WATER AGENCY ("KCWA") was created in 1961, coterminous with the boundaries of Kern County, for the purpose of acquiring water supplies for its member units from the DWR. On or about November 15, 1963, a water supply contract was executed between DWR and KCWA providing for annual deliveries of SWP water to KCWA on a permanent annual basis.

18. BERRENDA MESA WATER DISTRICT ("BMWD") was organized in 1963 in an area of Western Kern County. On or about March 9, 1967, a contract was executed between KCWA and BMWD for a permanent annual water supply from KCWA to BMWD.

B. BERRENDA MESA WATER DISTRICT AND GEOGRAPHIC MARKET

19. BMWD was formed on the basis of DWR figures for the projected costs of agricultural water from the SWP. The DWR figures projected that an acre foot of water would cost $23 in 1985 and $24 in 1990. An acre foot of water actually cost the farmer $77.67 in 1985, (237.7 percent more than projected); and in 1990 an acre foot actually cost $92.00 (383 percent more than projected). KCWA approved a transfer of additional water to BMWD from a purchase of 50,000 acre feet of water from Semitropic Water Storage District and amended its water supply contract between KCWA and BMWD on or about June 4, 1971, to provide for an annual supply of water to BMWD, beginning in 1990, of 155,100 acre feet. By 1979, the

BMWD consisted of approximately 55,000 acres. Based on the annual firm entitlement to BMWD, landowners within BMWD were entitled to approximately 2.82 acre feet of water per acre of land per year.

C. POWERS OF BMWD BOARD OF DIRECTORS

20. The BMWD Board of Directors is comprised of five members selected by the landowners within the district. Voting representation is one vote for every dollar of assessed value for land owned within the district, pursuant to Water Code §35003.

21. BMWD is empowered to charge the following costs against landowners within the district:

(1) Stand-by charge per acre, to be levied on all lands in the service area whether receiving water or not. This charge is to pay the debt service, administration costs, and fixed costs of the SWP.

(2) Ad Valorem Assessment of $6.00 per $100 assessed value, resulting in a $3 per acre tax levy on all lands in the BMWD, whether receiving water or not; and

(3) Water tolls based on water actually received. The water tolls are comprised of two components as follows:

(a) Base Water Toll for each acre foot of water delivered to a landowner which pays for all BMWD operational costs other than power and SWP variable costs; and

(b) Power Costs, which pay for BMWD power costs for pumping and SWP variable costs, which vary depending upon the particular

pumping plants serving an area and the turnout location from State Water Project facilities.

D. POWER TO IMPOSE LIENS

22. BMWD also is empowered to impose a lien against land on which stand-by charges and ad valorem assessments are delinquent and to cause a foreclosure sale of such properties in order to satisfy such liens. At all times relevant to this action up until 1990, BMWD assessed stand-by charges to all landowners in the service area regardless of whether water was available or used by the landowner.

23. The enormous increases in the costs of state water drove almost all row crop farmers out of business in BMWD. In or about December 1984, BMWD began to experience major delinquencies in payment of the stand-by charges as well as payment of the ad valorem assessments and water tolls. Many of the row crop farmers went under because they could not afford the costs of water, and over 6,800 acres of row crop land was in default by 1985. By 1988, over 8,000 acres of row crop land was in default.

24. On or about July 24, 1985, the BMWD Board of Directors passed Resolution No. 537, which contained the following financial provisions:

> *Section 6: Ad Valorem Taxes.* Annually, BMWD shall levy an ad valorem tax sufficient to produce an average of $3.00 per assessable acre within BMWD for the purpose of contributing to

and payment of the bond service costs of BMWD.

Section 7: Basic Water Tolls In Non-Stand-by Years. In any year in which BMWD receives at least 1.5 acre feet of water per acre of land in the Service Area of BMWD and water orders *equal or exceed* BMWD's contract entitlement for such year or the amount of water available for such year, whichever is less, no stand-by charge shall be imposed and the balance of all fixed costs and all variable costs, exclusive of variable pumping costs as described in Section 11 hereof, shall be raised by means of a basic uniform water toll for all water delivered during such year.

Section 8: Stand-by Charges. In any year in which BMWD receives at least 1.5 acre feet of water per acre of land in the Service Area of the District and water orders are *less* than BMWD's contract entitlement for such year or the amount of water available for such year, whichever is less, the balance of all BMWD's fixed costs for said year shall be raised by a uniform stand-by charge to be levied upon all lands in the Service Area of BMWD.

This resolution also provided that in years in which a stand-by charge is imposed, all variable costs of BMWD for that year, exclusive of the incremental pumping costs, shall be raised by means of a basic uniform water toll for all water delivered by BMWD for such year.

E. PROPOSED SALE OF WATER

25. In or about early 1986, the largest landowners within the BMWD were Defendants BLACKWELL and

BMF. The BMWD Board of Directors was composed of two directors hand picked by Defendant BLACKWELL, two directors hand picked by defendant BMF, and one other director. The Board decided that approximately one-third of its maximum annual entitlement, or 50,000 acre feet, was surplus to its long-term needs, and that it should sell that portion of its SWP entitlement if a buyer could be found.

26. On or about March 6, 1986, the BMWD Board of Directors sent a letter to every water district in Kern County, to KCWA and to the DWR, stating that the Board of Directors, acting pursuant to the powers vested in it by Section 35604 of the Water Code, and all other statutes in such case made and provided, had made the determination that it was in the best interest of the District to sell approximately 50,000 acre feet of its maximum annual entitlement from the SWP. This letter also advised that if no district or combination of districts in Kern County was prepared to purchase this water at its market value, BMWD intended to offer this water for sale outside Kern County. The letter also noted the then recent decision of KCWA that KCWA could not fix the price of water when transferred; and BMWD's belief that KWCA would not attempt to impose territorial restraints on the policy of the State of California and DWR that there be a free market in water.

27. On or about May 7, 1986, the BMWD Board of Directors communicated with the director of DWR, to advise him of BMWD's wishes to sell water and to inquire about DWR approval. The Director of DWR advised the directors that DWR would approve the sale.

28. On or about November 13, 1986, KCWA set a hearing on the subject of proposed transfers of SWP entitlement. All five BMWD directors authorized the transfer of the 50,000 acre feet of the BMWD maximum annual entitlement. On or about February 26, 1987, BMWD sent a letter to KCWA urging approval of the water transfer.

29. In or about 1987, BMF opposed the sale of BMWD water which its representatives on the board of Directors had previously approved. BMF had permanent crops (vines and trees) on all of its land in BMWD. As a result, BMF used all of its water allocation and could not directly benefit from selling water. BMF would benefit if water was not sold, since some farmers could not farm because of the cost of the water and therefore were unable to use their water allocation. BMF would gain use of this extra water without extra stand-by charges. In addition, the sale of water would result in a smaller allocation to BMWD. If no sale occurred it would result in added water available to those landowners in BMWD in later years.

30. In early 1988, negotiations for a sale by BMWD of the 50,000 acre feet of annual entitlement water began with the Moulton Niguel Water District, at the direction of the BMWD Board of Directors. Several Memorandums of Understandings were exchanged by the parties with the contemplation that a final Memorandum of Understanding would be executed in late August 1988.

31. On or about July 15, 1988, BMWD published notice of hearings on the sale of 50,000 acre feet of its annual entitlement to Moulton Niguel, Santa Margarita,

and Orange County Water Districts, for $1000 per acre foot, for a total sale price of $50 million. At the same time, BMWD filed with the State clearing house and circulated its Initial Study and Proposed Negative Declaration" regarding the proposed transfer and took all steps necessary to sell water.

F. UNLAWFUL ACTS OF DEFENDANTS

32. Prior to 1988, BLACKWELL entered into various agreements with certain unnamed co-conspirators to act in concert in voting on the BMWD Board. One or more of those co-conspirators were BERRENDA MESA FARMING, WEST MILLS COOPERATIVE, INC., and A & P. At a time unknown to plaintiffs, they entered into agreements to act in concert with the intent to harm the plaintiffs as set forth below.

33. Plaintiffs are informed and believe that sometime after July, 1988, PARAMOUNT entered into negotiations with WEST HILLS for the purchase by PARAMOUNT of WEST HILLS' agricultural land located in the BMWD. Plaintiffs are further informed and believe that a critical term of the negotiations was that PARAMOUNT be assured that it had an adequate supply of water for such lands and that a condition to any such sale would be that BMWD not allow the sale of any water to which the landowners therein were entitled.

34. Plaintiffs are informed and believe that sometime shortly after PARAMOUNT centered into negotiations with WEST HILLS, PARAMOUNT entered into

negotiations with defendant BLACKWELL for the purchase by PARAMOUNT of acreage located in BMWD from BLACKWELL for approximately $50 million and entered into various illegal agreements set forth below.

35. On various occasions in October 1988 defendants met secretly in a series of closed meetings in violation of the Ralph M. Brown Act (Government Code Section 54950, et seq.) to discuss the sale of water to the Moulton Niguel Water District. The defendants decided in such secret sessions that irrespective of the best interests of the District they did not want to sell water to the Moulton Niguel Water District and that regardless of the recommendation of the Berrenda Mesa Water District's counsel, they would not pursue the proposed transfer.

36. On or about November 22, 1988, the BMWD Board of Directors met in closed session to discuss the water transfer. At this meeting, contrary to their previous positions, the BLACKWELL and WEST HILLS representatives on the Board withdrew their support of this proposed water transfer and expressed a desire to put the water sale on permanent hold all in agreement with coconspirators. An informal vote was held and the sale of water was terminated by a 4 to 1 decision.

37. In or about 1989, defendant PARAMOUNT bought the holdings of WEST HILLS. Shortly thereafter, PARAMOUNT completed purchase of acreage from BLACKWELL in the BMWD, thereby becoming the largest landholder in BMWD. The WEST HILLS representatives on the BMWD Board of Directors were replaced by PARAMOUNT representatives.

38. On or about September 15, 1989, PFI sent a letter to BMWD to report acquisitions by its affiliates of various properties within BMWD, including land owned by WEST HILLS and BLACKWELL; and to insure that two PARAMOUNT representatives would be on the BMWD Board of Directors.

39. In or about March 1990, at a BMWD board meeting, the directors publicly passed a motion to suspend the water sale, with the PARAMOUNT representatives and one BLACKWELL representative voting for no water sales. Acting under color of state law, defendants' decision to suspend the water sale constituted an intentional deprivation of plaintiffs' substantial property rights in violation of plaintiffs' due process rights under the Fourteenth Amendment of the United States Constitution and Article I, Section 7 of the California Constitution in that since the decision to put the water sale on permanent hold had been made on November 22, 1988, plaintiffs' opportunity to be heard on the issue in March 1990 was not at a meaningful time or in a meaningful manner. Rather, the public hearing aspect of that decision was merely perfunctory in nature.

40. On or about August 21, 1990, BMWD Board of Directors decided on a three to two vote to again market surplus water. The vote was opposed by the two PARAMOUNT representatives on the board. Shortly thereafter and on or about September 5, 1990, the BMWD Board of Directors approved a Memorandum of Understanding approving sale of 20,000 acre feet to Summit Valley Water District ("Summit Valley") for $1,000 per acre foot for a total sale price of $20 million. This vote was opposed by the PARAMOUNT representatives on the Board.

41. On or about September 5, 1990, PARAMOUNT and A & P sent a letter to BMWD threatening litigation for damages and injunctive relief against BMWD directors who voted to approve the sale of water to Summit Valley.

42. On or about September 17, 1990, a BMWD director and one of the PARAMOUNT and A & P representatives sent a letter to KCWA urging that it not approve the sale and threatening to nullify the Summit Valley transaction through any available means should it be approved.

43. Thereafter, BLACKWELL representatives on the BMWD Board of Directors concurred with PARAMOUNT to delay the approved transfer of water to Summit Valley.

44. On or about August 20, 1991, the BMWD Board of Directors met. BLACKWELL and the PARAMOUNT representatives voted to cancel the Summit Valley Memorandum of Understanding and the vote was carried three to one with one BLACKWELL representative being absent.

45. On or about October 15, 1991, the BMWD Board of Directors set stand-by charges at $268 per acre for 1992, and water tolls at $48 per acre foot.

46. On or about April 18, 1992, PARAMOUNT sent a letter to BMWD indicating that it had available for transfer 12,840 acre feet of water out of Belridge Water Storage District. 1,240 acre feet of this amount would go to Lost Hills Water District and the rest into the BMWD water supply. PARAMOUNT requested that this approximately 11,600 acre feet of water be carried over in PARAMOUNT's name.

47. On or about June 16, 1992, four landowners in the BMWD brought a petition to the Board of Directors to sell water. The Board of Directors disregarded this pursuant to a secret pact and moved to send a letter to BMWD landowners delinquent in their assessments, indirectly threatening a foreclosure action if the assessments were not brought current. The two PARAMOUNT directors and the one BLACKWELL director who was present voted in favor of this action, and this action was carried.

48. On or about June 19, 1992, BMWD sent a letter to delinquent landowners indirectly threatening to reinstate foreclose proceedings on their properties if assessments were not brought current. These foreclosure proceedings had been tolled since August 21, 1990.

VII

MONOPOLY POWER

49. Defendant PARAMOUNT currently controls and farms approximately 15,668 acres in the BMWD service area (over 30% of the property in the service area) and approximately 1,964 acres in the BMWD non-service area. Defendant BLACKWELL currently controls and farms over 12,761 acres in the BMWD service area (almost 25% of the property in the service area) and approximately 2,556 in the BMWD non-service area. Together they own and control over 55% of the property in the service area.

VIII

CONCEALMENT OF AGREEMENTS

50. Defendants intentionally concealed the fact that they had secret agreements not to allow the sale of water

by BMWD landowners, as well as other agreements all directed at harming other landowners in BMWD. Plaintiffs did not discover this fact until September, 1992, when it was disclosed that defendants, PARAMOUNT and BLACKWELL, had agreements to cooperate as described in the complaint. Plaintiffs remained in ignorance of such facts through no fault of their own until September, 1992.

IX

ANTITRUST INJURY

51. In 1992, there are approximately 55,000 acres in BMWD. Approximately 6,800 acres have been foreclosed and reclaimed by BMWD. Another approximately 6,100 acres are in default on stand-by charges. Another 5,600 acres are in the non-service area with Ad Valorem taxes owing. Approximately 35,000 acres are stand-by acres in the service area entitled to receive water.

52. By reason of the aforesaid illegal and unlawful conduct and as a direct and proximate result of such conduct, the plaintiffs have been injured by their loss of profits and loss of monies due to excessive payments of stand by charges and taxes all through the loss of right to sell water. Said losses shall be set forth below.

X

FIRST CLAIM FOR RELIEF

CONSPIRACY TO ELIMINATE COMPETITION BY UNFAIR BUSINESS CONDUCT - RULE OF REASON ILLEGALITY UNDER SHERMAN ACT SECTION 1

53. Plaintiffs incorporate herein by reference all of the above, as though fully set forth herein.

54. Plaintiffs own land in the BMWD for the business purpose of farming said land. Said land is not useable for farming purposes, unless it receives irrigation water through the BMWD. Plaintiffs invested substantial amounts of money in said land and entered BMWD in order to engage in the business of farming.

55. The acts alleged in this first claim for relief to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction or control of its affairs and acting on its behalf within the scope of their employment.

56. Beginning sometime in or about 1988, and continuing thereafter at least until the present, the exact date of beginning to the plaintiffs being unknown, the defendants entered into an unlawful conspiracy and constraint of the aforesaid interstate commerce and farming business in violation of 15 U.S.C. §1, commonly known as the Sherman Antitrust Act.

57. The aforesaid conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants to embark upon a plan and

scheme, individually and in conspiracy with others, to compete unfairly with plaintiffs, to force plaintiffs into default on BMWD assessment charges and fees, and to foreclose upon plaintiffs, thereby obtaining their water rights for their own use; and to prevent the sale of BMWD water, in order to prevent plaintiffs from obtaining a profit, and to destroy plaintiffs as competitors for BMWD water. Defendants BLACKWELL, PARAMOUNT, PFE, POH, and PFI, entered into and joined in the aforesaid plan, scheme, and conspiracy to destroy the business of plaintiffs at the times and in the manner hereinabove set forth.

58. In formulating and effectuating the aforesaid conspiracy, plaintiffs have thus far learned that defendants conspired to perform, and did perform, and in furtherance of their unlawful scheme, plan, and conspiracy to eliminate plaintiffs as competitors, the unlawful acts set forth as follows:

A. The defendants, through their appointment of a majority of the Board of Directors and control of those Directors, continued to impose stand-by charges on plaintiffs, knowing that plaintiffs were unable to use BMWD water profitably;

B. The defendants, through their appointment of a majority of the Board of Directors and control of those Directors, foreclosed on BMWD landowners, and obtained use of the waters previously allocated to those landowners to which they would otherwise not have been entitled and at a much reduced rate;

C. The defendants interfered, interrupted, opposed, and blocked sales of BMWD water which would

have paid all of plaintiffs' delinquent assessments and yielded profits to plaintiffs and all other landowners in BMWD. These actions were done with the intent of insuring the maximum water entitlement to BMWD so that even in drought years the defendants would have adequate water supplies.

D. Defendants, through their appointment of a majority of the Board of Directors and control of those Directors, have indirectly threatened to foreclose upon plaintiffs for delinquent assessments, knowing that they would thereafter obtain plaintiffs' water allotments for themselves.

59. The foregoing acts were intentionally and maliciously done for the express purpose of destroying the business of plaintiffs and eliminating plaintiffs as competitors.

60. Said acts of defendants constitute unreasonable restraints upon interstate trade and commerce, and have crippled the business of plaintiffs by forcing them to incur unfair stand-by charges for water they could not use profitably, by preventing them from selling their water allotments, thereby preventing plaintiffs from paying their delinquent assessments and realizing a profit on their farm lands; and in these and various other respects have caused plaintiffs serious damage and loss as set forth below:

A. All plaintiffs were damaged by the unfair assessment of stand-by charges on land which they could not farm profitably, and therefore, did not order or receive water, and these damages will equal the amount of stand-by charges plus interest from the year in which

these charges were assessed until the present. By way of example, plaintiff, RODEN FARMS for the years 1982 through 1986 was assessed $426,432 in stand-by charges. At 7% interest, the interest accrued for those charges from the date they were incurred to the present equals $251,514 for total damages of $677,946. Plaintiff CAL FARM INVESTMENTS, INC., for the years 1983 through 1987, had total damages by this calculation of stand-by charges plus 7% interest from the date the charges were incurred to the present, of $1,702,200;

B. All plaintiffs were damaged by the prevention of water sales in the following manner:

Plaintiffs were allotted 2.82 acre feet per acre, and the proposed sales were for a price of $1,000 per acre foot, so that plaintiffs' total damages equals 2.82 times $1,000 times the number of plaintiffs' acres in BMWD minus the BMWD bonded indebtedness on these acres.

61. Unless the defendants are prevented from continuing to carry out the acts, plans, schemes, and conspiracy referred to above, plaintiffs' businesses will be destroyed or will continue to at least be seriously and irreparably injured and damaged.

62. The aforesaid acts of defendants have caused, and are continuing to cause, immediate and irreparable harm and damage to plaintiffs, for which there is no adequate remedy at law.

XI

SECOND CLAIM FOR RELIEF

ATTEMPT TO MONOPOLIZE – RULE OF REASON ILLEGALITY SHERMAN ACT SECTIONS 1 and 2

63. Plaintiffs incorporate herein by reference all of the above as though fully set forth therein.

64. Defendants PARAMOUNT, PFE, POH, PFI and BLACKWELL engaged in an unlawful conspiracy to monopolize trade, and attempted to monopolize farming and water entitlement within the BMWD, in violation of Section 2 of 15 U.S.C., commonly known as the Sherman Antitrust Act.

65. The aforesaid conspiracy or combination to monopolize and/or attempt to monopolize consisted of a continuing agreement, understanding, and concert of action among the defendants to embark upon a plan and scheme, individually and in conspiracy with others, to compete unfairly with plaintiffs, to assess stand-by charges and charges upon plaintiffs and other land-owners in BMWD who were unable to use water because of the prohibitive costs, to foreclose upon lands where these assessments were delinquent, to obstruct, interrupt, and prevent sales of water which would have paid all delinquent assessments and brought profit to plaintiffs and other landowners of BMWD, and to destroy plaintiffs as competitors.

66. In formulating and effectuating the aforesaid attempt to monopolize and conspiracy to monopolize, plaintiffs have thus far learned that defendants conspired to perform, and did perform, in furtherance of their

unlawful scheme, plan, and conspiracy to eliminate plaintiffs as competitors, the unlawful acts set forth as follows:

A. Defendants prevented two attempted sales of BMWD water, which would have paid all delinquencies and assessments owed by plaintiffs and allowed plaintiffs to realize a profit from the sale of their water entitlement;

B. Defendants, through their appointment of a majority of the Board of Directors and control of these Directors, caused BMWD to foreclose on BMWD landowners, and obtained use of the waters previously allocated to those landowners to which they would otherwise not have been entitled and at a much reduced rate;

C. Defendants, through their appointment of a majority of the Board of Directors and control of these Directors, then caused BMWD to threaten to foreclose upon plaintiffs for these delinquent assessments so that plaintiffs would lose their farming land within the BMWD, which would result in all of plaintiffs' water entitlement being available to defendants for their own use and profit, and which would have eliminated plaintiffs as competitors for water in the BMWD.

D. The foregoing acts were intentionally and maliciously done for the express purpose of destroying the business of plaintiffs and eliminating plaintiffs as a competitor, and have caused damages to plaintiffs as follows:

(1) All plaintiffs were damaged by the unfair assessment of stand-by charges on land which they could not farm profitably, and therefore, did not receive water,

and these damages will equal the amount of stand-by charges plus interests from the year in which these charges were assessed until the present. By way of example, plaintiff, RODEN FARMS for the years 1982 through 1986 was assessed $426,432 in stand-by charges. At 7% interest, the interest accrued for those charges from the date they were incurred to the present equals $251,514 for total damages of $677,946. Plaintiff CAL FARM INVESTMENTS, INC., for the years 1983 through 1987, had total damages by this calculation of unfair stand-by charges plus 7% interest from the date the charges were incurred to the present, of $1,702,200;

(2) All plaintiffs were damaged by the prevention of water sales in the following manner:

Plaintiffs were allotted 2.82 acre feet per acre, and the proposed sales were for a price for $1,000 per acre foot, so that plaintiffs' total damages equals 2.82 times $1,000 times the number of plaintiffs' acres in BMWD minus the BMWD bonded indebtedness on these acres.

67. Said acts of defendants would destroy plaintiffs as competitors in the BMWD and because defendants control the vote of the Board of Directors of BMWD, there is a dangerous probability that defendants will be successful in their plan.

68. Unless the defendants are prevented from continuing to carry out the acts, plans, schemes, and conspiracy referred to above, plaintiffs' businesses will be destroyed, or will continue to at least be seriously and irreparably damaged and injured.

69. The aforesaid acts of defendants have caused, and are continuing to cause immediate and irreparable harm and damage to plaintiffs, for which there is no adequate remedy at law.

XII

THIRD CLAIM FOR RELIEF

MONOPOLIZATION – RULE OF REASON ILLEGALITY UNDER SHERMAN ACT §§ 1 and 2

70. Plaintiffs incorporate herein by reference all of the above as though fully set forth herein.

71. Defendants PARAMOUNT, PFE, and POH began to acquire farm land within the BMWD in 1988 and 1989, and by September 1989, these defendants had acquired all of the land of West Hills Cooperative, West Falls Ranches, Secrist Ranch, and all of the pistachio acreage of BLACKWELL and El Vic Farm Corporation. These defendants thus became the largest landowner within the BMWD, owning, along with defendant BLACKWELL, approximately 55 percent of the land in the service area of BMWD, and also became the largest water user in the BMWD, using approximately 80 percent of the water available through BMWD.

72. Pursuant to their decision to monopolize the market for water deliveries within the BMWD, defendants elected two of their representatives to the five member BMWD Board of Directors. In March 1990, the Directors passed a motion to suspend proposed sales of BMWD surplus water. In September 1990, these defendants threatened to litigate against BMWD if the directors

voted to approve a contract to sell water to Summit Valley Water District, even though the Board of Directors had approved a Memorandum of Understanding approving sale of at least 20,000 acre feet to Summit Valley Water District. Also, in September 1990, defendants sent a strong opposition letter to KCWA, arguing that there was no surplus water in BMWD and threatening to nullify any transaction through any available avenue. Thereafter, defendants agreed to delay consummation of the Summit Valley deal until August 20, 1991, when defendants' representatives on the BMWD Board of Directors voted to cancel the Summit Valley Memorandum of Understanding, which motion was carried by a three to one vote. Thereafter, in June 1992, defendants, through their representatives on the BMWD Board of Directors, moved to send a letter to delinquent landowners, and did send a letter to plaintiffs indirectly threatening to foreclose on BMWD lands in assessment arrears.

73. The foregoing and other predatory practices, together with their dominant market position within BMWD, enabled defendants to maintain their monopoly power within the BMWD that threatens to destroy much of the remaining competition for BMWD water within the district.

74. Defendants' attempt to monopolize the market for BMWD water services and their actual monopolization of approximately 80 percent of water deliveries empowers them to foreclose competition in that market. Defendants' attempts to cause foreclosure on remaining landowners in BMWD who are in arrears in their assessments is designed to make it virtually impossible for

plaintiffs or other potential competitors to effectively farm within the BMWD.

75. Plaintiffs have been and continue to be injured, directly and proximately in their business and property by reason of defendants possession and continuing exercise of its monopoly power to foreclose competition. Such monopoly has prevented plaintiffs from realizing the benefits of water transfers, which would have eliminated plaintiffs' arrears and brought a profit to plaintiffs' farming operations. Defendants' power to foreclose competition threatens to drive plaintiffs out of business completely by forfeiting their lands within BMWD.

76. The foregoing acts are intentionally and maliciously done for the express purpose of destroying the business of plaintiffs and eliminating plaintiffs as a competitor and maintaining defendants' monopoly power within the BMWD, and have caused damages to plaintiffs as follows:

A. All plaintiffs were damaged by the unfair assessment of stand-by charges for land at which they could not farm profitably, and therefore, did not receive water, and these damages will equal the amount of stand-by charges plus interest from the year in which these charges were assessed until the present.

B. All plaintiffs were damaged by the prevention of water sales in the following manner:

Plaintiffs were allotted 2.02 acre feet per acre, and the proposed sales were for a price of $1,000 per acre foot, so that plaintiffs' total damages equals 2.82 times $1000

times the number of plaintiffs' acres in BMWD minus the BMWD bonded indebtedness on these acres.

77. Said acts of defendants would destroy plaintiffs as competitors in the BMWD and cause plaintiffs to lose their business and property in the BMWD.

78. Unless the defendants are prevented from continuing to exercise this monopoly power, plaintiffs' businesses will be destroyed, or will continue to at least be seriously and irreparably damaged and injured.

79. The aforesaid acts of defendants have caused, and are continuing to cause, immediate and irreparable harm and damage to Plaintiffs, for which there is no adequate remedy of law.

XIII

FOURTH CLAIM FOR RELIEF

INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

80. Plaintiffs incorporate hereby by reference all of the above as though fully set forth herein.

81. In or about 1991, plaintiffs had an economic relationship with third parties, with the probability of future economic benefit to plaintiffs, in that plaintiffs desired to sell their water allotment through BMWD, and BMWD had agreed to transfer water at the price of $1,000 per acre foot. Defendants, and each of them, knew of the above-described agreements to sell BMWD water in 1988 to Moulton Niguel Water District and in 1991 to Summit Valley Water District.

82. As hereinabove described, defendants intentionally acted to disrupt said economic relationship in that defendants caused Directors of the BMWD not to complete the agreed upon transfers of water, acted through their own representatives on the Board to cancel Memorandums of Understanding to transfer water and otherwise obstructed, hindered, and prevented the above described transfers of BMWD water by causing BMWD directors to abandon the agreed upon sale of water.

83. As a result of defendants' actions, said economic relationships were actually disrupted in that BMWD cancelled the Memorandums of Understanding for the proposed water transfers and broke off contract negotiations with prospective water purchasers.

84. As a proximate result of defendants' conduct and the severance of contract negotiations by BMWD, plaintiffs have suffered damages in an amount to be determined at trial.

85. The aforementioned acts of defendants, and each of them, were willful and oppressive and malicious. Plaintiffs are therefore entitled to punitive damages in an amount to be determined at trial

XIV

FIFTH CLAIM FOR RELIEF

NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

86. Plaintiffs incorporate herein by reference all of the above as though fully set forth herein save and except Paragraph 82.

87. Defendants were aware, when they interfered with the proposed water transfers, that plaintiffs were depending upon the proceeds of said water transfers to pay off debts and maintain their farming and property interests in the BMWD, and that plaintiffs would be injured by the loss of these water sale proceeds. Defendants had a duty to refrain from taking actions under color of their official capacity which would interfere with and damage plaintiffs as aforesaid. Nevertheless, defendants caused Directors of the BMWD not to complete the agreed upon transfers of water, acted through their own representatives on the Board to cancel Memorandums of Understanding to transfer water and otherwise obstructed, hindered, and prevented the above described transfers of BMWD water by causing BMWD Directors to abandon the agreed upon sale of water. In so doing, defendants negligently interfered in the proposed sales and prevented the BMWD from completing these transfers of water.

88. As a result of defendants' negligence, the BMWD transfers were negated and plaintiffs suffered damages in an amount to be determined at trial.

XV

SIXTH CLAIM FOR RELIEF

CALIFORNIA CARTWRIGHT ACT AND UNFAIR COMPETITION LAWS - CAL. BUS. & PROF. CODE §§ 16700-16760, 170000-17101, 17200-17208

89. Plaintiffs incorporate herein by reference all of the above, as though fully set forth.

90. Since 1988 and up to the present time, defendants, and each of them, combined, conspired, and decreed together and continue to combine, conspire, and agree to create restrictions in trade and to prevent competition in the purchase of SWP water within BMWD.

91. In furtherance of this unlawful combination, conspiracy, and agreement, defendants obstructed, hindered, interfered, and prevented the transfer of BMWD water in 1988 and 1991, and indirectly threatened to reinstate foreclosure proceedings upon land owners within BMWD who were delinquent in payment of their assessments.

92. As a direct consequence of the acts of defendants, and each of them, competition in farming and in purchasing and obtaining SWP water through BMWD has been restrained, suppressed, and eliminated.

93. As a direct consequence of the agreement, acts, and course of conduct of defendants, and each of them, plaintiffs were deprived of the opportunity to realize a profit from the sale of water to other water districts. As a result of defendants actions, plaintiffs have been damaged as follows:

A. All plaintiffs were damaged by the unfair assessment of stand-by charges on land which they could not farm profitably, and therefore, did not order or receive water, and these damages will equal the amount of stand-by charges plus interest from the year in which these charges were assessed until the present.

B. All plaintiffs were damaged by the prevention of water sales in the following manner:

Plaintiffs were allotted 2.82 acre feet per acre, and the proposed sales were for a price of $1,000 per acre foot, so that plaintiffs' total damage equals 2.82 times $1,000 times the number of plaintiffs' acres in BMWD, minus the BMWD bonded indebtedness on these acres.

Under § 16750(a) of the California Business and Professions Code, Plaintiffs are entitled to interest on the aforementioned sum from the date of service of this complaint until entry of judgment thereon, to their reasonable attorney's fees, and to treble damages.

94. Defendants' continued wrongful conduct as alleged above, unless and until restrained by order of this court, will cause great and irreparable harm to plaintiffs.

XVI

SEVENTH CLAIM FOR RELIEF

DECLARATORY RELIEF

95. Plaintiffs incorporate herein by reference all of the above, as though fully set forth.

96. Defendant BERRENDA MESA WATER DISTRICT has, and at all times mentioned herein had, a fiduciary duty to all members of the Berrenda Mesa Water District, including the minority landowners within the district.

97. An actual controversy has arisen and now exists between plaintiffs and defendants concerning their respective rights and duties, in that plaintiffs contend that the Berrenda Mesa Water District, acting through its agents, has breached and continues to breach its fiduciary duties to minority landowners in the district by failing to

complete agreed upon transfers of water, and by not aggressively pursuing, on behalf of those members interested in selling water, sales of water. Defendant BERRENDA MESA WATER DISTRICT disputes these contentions and contends that it has not breached its fiduciary duties to minority landowners within the district.

98. Plaintiffs desire a judicial determination of their rights and defendant's duties.

99. A judicial declaration is necessary and appropriate at this time under the circumstances in order that plaintiffs may ascertain their rights with respect to any future sales of water particularly because Berrenda Mesa Water District purports to be currently considering sales of water.

WHEREFORE, plaintiffs pray that judgment be entered against defendants as follows:

XVII

FOR RELIEF UNDER THE FIRST CLAIM

1. That the court adjudge and decree that defendants have entered into a contract for conspiracy and in unreasonable restraint of trade and commerce in violation of § 1 of the Sherman Act, that the foresaid contract or conspiracy is illegal, and that said contract or conspiracy be ordered to be cancelled and terminated;

2. Defendants, and each of them, be enjoined preliminarily during the pendency of this action, and permanently thereafter from:

(a) Foreclosing upon plaintiffs' property for the payment of delinquent stand-by charges and water toll assessments.

(b) Directly or indirectly hindering or obstructing, or preventing the sale of BMWD water to persons or entities outside BMWD.

(c) Directly or indirectly assessing stand-by charges to plaintiffs, when plaintiffs are unable to economically utilize their entitlement to BMWD.

(d) Unfairly competing with plaintiffs, and

(e) Conspiring with one another to do the foregoing acts;

3. That the plaintiffs have such other, further, and different relief, which to the court may seem necessary and appropriate;

4. For damages against defendants, and each of them, for threefold the amount of damages proved at trial together with plaintiffs' reasonable attorney's fees and all costs and disbursements of this action.

XVIII

FOR RELIEF UNDER THE SECOND CLAIM

1. That the court adjudge and decree that defendants have attempted and/or conspired to monopolize in unreasonable restraint of trade in violation of Section 2 of the Sherman Act, that the aforesaid attempt or conspiracy is illegal, and that said attempt or conspiracy be ordered to be cancelled and terminated.

2. That the court issue an injunction restraining perpetually the defendants, their successors, assignees, officers, directors, agents, employees, and persons acting for or in their behalf, from continuing the unlawful affects of such conspiracy.

3. That the plaintiffs have such other, further, and different relief which to the Court may seem necessary and proper.

4. That the court grant judgment for plaintiffs against defendants for threefold the amount of damages proved at trial together with reasonable attorney's fees and all costs and disbursements of this action.

XIX

FOR RELIEF UNDER THE THIRD CLAIM

1. That the Court adjudge and decree that defendants BLACKWELL, PARAMOUNT, PFE, and POH have acquired and maintained a monopoly of SWD water available through the BMWD, and has acquired and maintained that power in violation of Section 2 of the Sherman Antitrust Act;

2. That the Court issue an injunction restraining perpetually the defendants, their successor, assignees, officers, directors, agents, employees, and persons acting for or in their behalf, from undertaking further acquisition or acts to maintain that power and monopoly of SWP water and BMWD;

3. That the court order that defendants be required to divest themselves of all or such portion of their water entitlement as is deemed necessary to restore normal

competitive conditions, as soon after the final decision in this court is entered, as this court deems reasonable;

4. That plaintiffs have such other, further, and different relief which to the court may seem necessary and appropriate;

5. That the Court grant a judgment for plaintiffs against defendants for threefold the amount of damages as proved at trial together with reasonable attorney's fees and all costs and disbursements of this action.

XX

FOR RELIEF UNDER THE FOURTH CLAIM

1. That the Court grant judgment for plaintiffs against defendants for damages in an amount to be determined at trial;

2. For exemplary and punitive damages in an amount to be determined at trial;

3. For plaintiffs' costs incurred;

4. That the plaintiffs have such other, further, and different relief which to the Court may seem necessary and proper.

XXI

FOR RELIEF UNDER THE FIFTH CLAIM

1. That the Court grant judgment for plaintiffs against defendants for damages in an amount to be determined at trial;

2. For plaintiffs' costs incurred;

3. That the plaintiffs have such other, further, and different relief which to the court may seem necessary and proper.

XXII

FOR RELIEF UNDER THE SIXTH CLAIM

1. That the Court adjudge and decree that defendants have attempted and/or conspired to carry out restrictions in trade or commerce and to prevent competition in the sale of water and unreasonable restraint of trade in violation of § 16720 of the California Business and Professions Code, that the aforesaid conspiracy is illegal, and that said attempt or conspiracy be ordered to be cancelled and terminated;

2. That the Court issue an injunction restraining perpetually the defendants, their successors, assignees, officers, directors, agents, employees, and persons acting for or in their behalf from continuing the unlawful effects of such conspiracy;

3. That the plaintiffs have such other, further, and different relief which to the court may seem necessary and proper;

4. That the Court grant judgment for plaintiffs against defendants for threefold the amount of damages proved at trial together with reasonable attorney's fees and all costs and disbursements of this action;

5. For interest from and after the date of service of this complaint at the legal rate.

XXIII

FOR RELIEF UNDER THE SEVENTH CLAIM

1. That the Court declare the rights and duties of the parties as follows: that defendant BERRENDA MESA WATER DISTRICT has breached its fiduciary duty to minority landowners within the district by failing to complete agreed upon transfers of water, by cancelling Memoranda of Understanding to transfer water, and by not aggressively pursuing sales of water on behalf of those members interested in selling water;

2. That the plaintiffs have such other, further, and different relief which to the Court may seem necessary and proper.

Dated: December 23, 1992.

JOSEPH W. COTCHETT (SBN 36324)
SUSAN ILLSTON (SBN 57378)
JOHN L. FITZGERALD
(SBN 126613)
NIALL McCARTHY (SBN 160175)
COTCHETT, ILLSTON & PITRE

FRANK C. DAMRELL, JR.
(SBN 37126)
MATTHEW PACHER (SBN 109378)
THOMAS BECK (SBN 123261)
DAMRELL, NELSON, SCHRIMP,
PALLIOS & LADINE

TIMOTHY BUCHANAN
(SBN 100400)
G. SCOTT FITZGIBBON
(SBN 141530)
DIETRICH, GLASRUD & JONES

By /s/ Matthew O. Pacher
MATTHEW O. PACHER
for Plaintiffs

PLAINTIFFS DEMAND TRIAL BY JURY

Plaintiffs hereby demand trial by jury on all counts in this complaint.

Dated: December 23, 1992.

By /s/ Matthew O. Pacher
MATTHEW O. PACHER
for Plaintiffs